No. 96-643

In The

Supreme Court of the United States

October Term, 1996

THE STEEL COMPANY, a/k/a CHICAGO STEEL AND PICKLING COMPANY,

Petitioner,

v.

CITIZENS FOR A BETTER ENVIRONMENT,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF AMICI CURIAE OF THE MID-AMERICA LEGAL FOUNDATION, ILLINOIS MANUFACTURERS' ASSOCIATION, PETROLEUM MARKETERS ASSOCIATION OF AMERICA AND WESTERN STATES PETROLEUM ASSOCIATION IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF THE AMICI CURIAE[1]

Pursuant to Supreme Court Rule 37.3, the Mid-America Legal Foundation, Illinois Manufacturers' Association, Petroleum Marketers Association of America and Western States Petroleum Association respectfully submit this brief as amici curiae in support of the Petitioner, The Steel Company. The members of the amici are typically subject to the environmental reporting requirements at issue in this case. Written consent was granted by counsel for all parties and filed with the Clerk of the Court.

Amicus Mid-America Legal Foundation (MALF) was organized in 1975 as an Illinois non-profit corporation to engage in study, analysis, and legal advocacy for the benefit of the general public. MALF endeavors to address evolving concepts of law as they affect free enterprise and our democratic institutions, especially where the outcome of litigation could potentially cause disruption to our national commerce, and to provide legal representation on matters of public interest on all levels of the judicial process. MALF takes a special interest in actions that originate in or have a direct effect on the Midwest region.

Amicus Illinois Manufacturers' Association (IMA) is an Illinois not-for-profit corporation founded in 1893 and is the oldest and largest statewide manufacturing association in the United States. IMA's membership numbers

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[1] Rule 37 Footnote: All counsel named on the cover contributed to the writing and editing of the Brief, with original drafts by William A. Price, general counsel, Mid-America Legal Foundation. The cost of the brief is paid for exclusively by the Mid-America Legal Foundation.

more than 4,700 Illinois manufacturing companies which employ over 80 percent of the total Illinois manufacturing work force.

Amicus the Petroleum Marketers Association of America (PMAA) is the national organization representing the nation's independent petroleum marketers. PMAA is a federation of state and regional trade associations from the 48 continental states and the District of Columbia. PMAA was formed in the early 1900's to provide an advocacy group on federal legislative and regulatory issues affecting petroleum marketers. PMAA represents over 10,000 marketers of petroleum products nationwide. Collectively, these marketers sell nearly half the gasoline, over 60 percent of the diesel fuel, and approximately 85 percent of the home heating oil consumed in the U.S. annually.

Amicus the Western States Petroleum Association (WSPA) is a trade association consisting of approximately 31 individual companies engaged in the production, refining and marketing of petroleum and petroleum products. Its members are responsible for more than 90 percent of the production of oil and gas on the Pacific coast of the United States.

SUMMARY OF ARGUMENT

If not reviewed by this Court, the Seventh Circuit decision will, in conflict with a decision by the Sixth Circuit and decisions interpreting similar provisions of cognate environmental laws by this Court, and expose businesses nationwide outside of the Sixth Circuit to the

risk of citizen suits for past violations under the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11046, which were cured before the citizen suit was filed. The decision of the Seventh Circuit also presents broad policy questions of concern to the amici curiae and those whose interests they represent, which only this Court can satisfactorily address.

The Court should reverse to establish the appropriate role for private citizen prosecutions for past and already cured EPCRA reporting violations. As it does so, it should consider the extensive network of government control mechanisms which limit and penalize reporting failures. Congress did not, and the Court should not, extend the activity of private prosecutors under EPCRA beyond that of assuring continued compliance. If the decision below is allowed to stand, self-auditing efforts by the huge number of companies subject to EPCRA will be discouraged.

Congress left to public prosecutors, not citizens, the discretion to pursue past violations. In many cases, a governmental agency may be satisfied that a company has come into compliance with EPCRA's complex reporting requirements, however late, and elect not to seek penalties for the past violations. The Illinois legislature has even gone so far as to require the Illinois Environmental Protection Agency to allow a party 30 days to cure an EPCRA reporting violation before initiating an enforcement action. Contrary to that pro-compliance goal, and in the absence of any congressional authority, the Seventh Circuit's decision encourages private citizen prosecutors to clog the courts by pursuing any past

EPCRA violation, however trivial, in an attempt to maximize their attorneys' fees. The Court should carefully consider the difference between public and private enforcement of past environmental violations, the policy implications in allowing citizens to sue for past violations, along with Congress's decision not to authorize citizens to sue for past EPCRA violations, and reverse the decision below.

ARGUMENT

I.

CITIZEN SUITS FOR PAST PAPERWORK VIOLATIONS ARE ONLY A SMALL PART OF THE REGULATORY PICTURE THIS COURT SHOULD CONSIDER

A. Large And Small Industrial Facilities Have Significant Reporting Burdens

The Court should consider the scope and variety of reporting burdens currently imposed by environmental statutes as it considers whether or not to set private prosecutors on the trail of organizations which cure and report past EPCRA paperwork lapses. These reporting requirements are so stringent as to make inadvertent violations a real possibility, a possibility EPCRA recognizes by providing a grace period to cure without being subject to the additional penalty of a citizen suit. A Chemical Manufacturers Association study released this year estimated that U.S. industry is required to spend over $2.9 billion each year to prepare and submit reports under eight major environmental statutes: the Clean Air Act, Toxic Substances Control Act, Federal Insecticide,

Fungicide, and Rodenticide Act, Resource Conservation and Recovery Act, Comprehensive Environmental Response, Compensation and Liability Act, EPCRA, Clean Water Act and Safe Drinking Water Act. 2,982,052 reports were submitted in 1994 pursuant to the 37 reporting programs mandated by these laws. The United States Environmental Protection Agency (EPA) has estimated that 54,571,915 hours of workers' time are required for filling out and submitting the reports. At the EPA's estimated $53.00/hour cost for report preparation, the regulatory burden of this 1994 paperwork preparation is more than $2.9 billion. Pesticide and Toxic Chemical News, April 17, 1996, at 6-8. In fact, the CMA found that EPCRA's Section 313 reporting requirements are the most onerous among all environmental reporting requirements. *Id.*

The study also details the "extensive duplication" of EPA's requirements, along with those of the Occupational Safety and Health Administration and the Chemical Diversion and Trafficking Act, which have resulted in 37 different lists of chemicals with nearly 7,000 separate reporting requirements. These lists include more than 2,400 regulated chemicals and chemical categories. *Id.* Some confusion as to which reports are required, and when they are due, is both possible and probable, even if a good faith compliance effort is made by regulated industries.

Because so many reports are required from so many facilities, and because a party's good faith efforts are no defense to an EPCRA citizen prosecution, EPCRA offers citizen plaintiffs a huge number of potential litigation

targets. EPA has estimated that 866,285 industrial facilities are subject to EPCRA Section 312 reporting requirements. 60 Fed. Reg. 35201 (July 6, 1995). Approximately 30,000 facilities are required to submit Section 313 toxic release inventory forms. *See* General Accounting Office, *EPA's Toxic Release Inventory Is Useful But Can Be Improved*, (June 1991) GAO/RCED 91-121. Once a citizen group identifies a company which has missed a reporting deadline (a rather easy process), the company finds itself faced by two unattractive alternatives, litigation or settlement negotiations with little or no leverage.

Moreover, the burdens associated with proper reporting and regulatory compliance under EPCRA are not static, but are expanding. EPA is intent on expanding EPCRA reporting requirements and imposing ever more regulatory burdens on industry. *See* EPA Press Release, *EPA Moves Toward Major Expansion of Community Right-to-Know Information About Chemical Use by Industry*, Sept. 25, 1996. Recent Federal Register notices include:

- An EPA proposal to add over 6,400 facilities to the 30,000 now required to submit Section 313 toxic release inventory reports under EPCRA. The industries newly affected would include metal mining, coal mining, electric utilities, commercial hazardous waste treatment, chemical wholesalers, petroleum wholesalers, solvent recovery services, and any manufacturing facilities which receive wastes from other facilities and manage same through treatment or disposal. 61 Fed. Reg. 33588 (June 27, 1996); *see also* Chemical Marketing Reporter, Vol. 250, No. 9, August 26, 1996, at 7.

- An EPA Advance Notice of Proposed Rulemaking proposing extensive new accounting and tracking requirements and occupational exposure estimates for raw and finished materials brought to, used in, and shipped or disposed of from EPCRA reporting sites. 61 Fed. Reg. 51322 (Oct. 1, 1996).

Such reporting requirements are, of course, only part of the responsibilities associated with federal, state, and local environmental regulation. Comprehensive systems of statutes, regulations, and permits govern permissible discharge limits, required control technologies, operator certification, and a wide variety of other requirements designed to reduce or control air, water, and waste discharges. Civil and criminal sanctions may be imposed if the various mandates are violated. Government enforcement actions can and do deter companies from violating paperwork requirements because a party is always subject to government sanctions for past violations. Such enforcement obviously would remain in full force and effect if the Court agrees with the Sixth Circuit's reasoned analysis in *Atlantic States Legal Found., Inc. v. United Musical Instruments, Inc.*, 61 F.3d 473 (6th Cir. 1995), and decides that Congress intended to limit private prosecutions to those involving continuing violations.

B. Public, Instead Of Private, Control Over Prosecutorial Discretion Can Encourage Compliance.

Enforcement policy is likely to significantly influence the type and extent of voluntary compliance efforts by regulated organizations. When the Department of Justice

issued a 1991 guidance statement listing "regular internal or external compliance and management audits to evaluate, detect, prevent, and remedy circumstances such as those that led to the non-compliance" as a factor which should influence a prosecutor's decision as to whether to seek criminal sanctions against a party in violation of pollution control laws, it encouraged companies to conduct such audits. Paul G. Wallach and Dan Levin, *Using Government's Guidance to Structure a Compliance Plan*, National Law Journal, Aug. 30, 1993. Private counsel are often of two minds about such activity. On the one hand, an audit program can help in enforcement negotiation. On the other, it can provide evidence of violations which can be the basis of both government and citizen enforcement actions.

The Department of Justice has in the past expressed concern about who controls enforcement policy. DOJ testimony offered during the 1987 consideration of reauthorization of the Clean Water Act argued that the flood of private enforcement actions under the Act was coming dangerously close to producing the result Congress apparently meant to prevent – a shift of control over enforcement from the government to private parties. *See* Michael S. Greve, *Private Enforcement, Private Rewards: How Environmental Citizen Suits Became an Entitlement Program, in Environmental Politics: Public Costs, Private Rewards* 105, 120 (Praeger Publishers 1992). Those concerns are even more relevant here because the Seventh Circuit's decision grants citizen plaintiffs the same enforcement authority as the government – a result Congress could not have intended.

Current trends in industrial activity and in governmental policy favor active and voluntary compliance assurance programs. The International Standards Organization (ISO), which creates various standards used as corporate benchmarks for quality assurance, is in the process of developing its ISO 14,000 standards series. These standards encourage companies to go beyond the letter of the law. Such efforts may require permit and technology standards negotiations, and may disclose reportable violations or previously undiscovered toxic emissions.

Companies will have reduced incentive to conduct voluntary audits, identify environmental compliance improvement opportunities, update missing paperwork or self-report environmental violations if citizen groups are allowed to use these actions as the basis for citizen suits without the company first having the opportunity to cure any reporting deficiencies. If the Court allows the Seventh Circuit's decision to stand, or if it interprets EPCRA as authorizing citizen suits for past paperwork problems, it will discourage proactive compliance on the part of U.S. industry.

C. Private Prosecutions Favor Dollar Payments, Not Compliance

Paperwork violations, unlike discharges, unpermitted emissions, nonpoint source toxic runoffs, or deliberate and concealed releases of pollutants into the environment, are relatively easy to prove. Courts have held that records compiled and submitted pursuant to

regulatory requirements constitute admissions of punishable violations. *See, e.g., Sierra Club v. Simkins Indus.*, 617 F. Supp. 1120, 1130 (D. Md. 1985), *aff'd*, 874 F.2d 1109 (4th Cir. 1988), *cert. denied*, 491 U.S. 904 (1989). Private enforcement efforts have, in the past, focused on such paperwork violations, with effective bounties to the environmental community in the form of settlements containing attorney's fees at market rates (which may or may not match the actual costs incurred by the citizen organizations) and "credit projects," which may finance grants to local or regional environmental organizations, grants for land acquisition, or research activity. *See* Greve, *Private Enforcement*, at 109-110.

Private enforcers, under current conditions, possess enormous leverage in settlement negotiations. Violations of Sections 312 and 313 are punishable by civil penalties of up to $25,000 per violation. Every day that a facility does not comply with the requirements of these sections is considered a separate violation. Additionally, Section 312 reports are submitted to three government agencies, 42 U.S.C. § 11022(a)(1), and Section 313 reports to two, 42 U.S.C. § 11023(a). EPA considers each agency not reported to be a separate violation so that an overlooked report is more than one violation. EPA penalty policies assess a base amount for the first day of violation determined by statutorily mandated factors, including the seriousness of the violation, the size of the violator, the quantity of toxic chemicals used, prior history of violations, the violator's "attitude," ability to pay, and other factors. This base amount is assessed for the first day of violation, and subsequent days are also penalized. *See* Petition for Certiorari at A7.

Where an enforcement agency is involved, "attitude" and the organization's history of compliance efforts is relatively easily determined. Other compliance investments, the reputation and activity of the violator, and the number and types of violations encountered may be given great weight in settlement, with future compliance assurance and prospective later permit and other negotiations between the parties always a main focus. Where a private prosecutor pursues a violation, however, similar concerns are not present. The citizen organization simply has no economic interest in settling for less than the maximum possible penalty. *See* Greve, *Private Enforcement*, at 109-113.

The subject case indicates the injustice of permitting private, rather than public, prosecutions. According to EPA's Section 313 policy, EPA will reduce a penalty by 30% if a party cooperates with EPA and quickly complies with reporting requirements once it is informed of the violation. EPA EPCRA Section 313 Penalty Policy (Aug. 10, 1992), at 18. The Steel Company's quick compliance would entitle it to the reduction if the EPA were bringing an action.

On the other hand, when a private prosecutor sends a notice of intent to sue, parties who do not settle quickly on the prosecuting group's terms and choose to defend their rights are likely to face increased settlement demands and increased attorney fees for citizen groups.

The Seventh Circuit was obviously mistaken that Congress intended the 60-day notice period to allow "a would-be champion to try negotiation before litigation." Petition for Certiorari at A14 (citation omitted). To the

contrary, there is no arm's length negotiation in an EPCRA citizen action, and citizen groups use the notice period to attempt to intimidate parties into generous settlements. The Court should consider the economic incentives and motives which apply to private prosecutions, and limit their scope to no more than what Congress specifically intended.

II.

PRIVATE ACTIONS ARE LIMITED BY PUBLIC POLICIES EXPRESSED IN FEDERAL AND STATE STATUTES

A. Modern Environmental Statutes Show Congressional Concern With The Possible Abuse Of Citizen Suit Authority

The general rule of law is that unless Congress provides otherwise, parties are to bear their own attorney's fees. (*Fogerty v. Fantasy, Inc.*, 114 S. Ct. 1023, 510 U.S. 517, 127 L. Ed. 2d 455, *on remand* 1995 WL 261504, *affirmed and remanded* 94 F. 3d 553 (U.S. Cal. 1994).) Even when allowing attorney's fees as "fee-shifting" would be appropriate as a matter of equity, Congress has the power to circumscribe such relief. (*Hall v. Cole*, 93 S. Ct. 1943, 412 U.S. 1, 36 L. Ed. 2d 702 (U.S. N.Y. 1973).) The Court has chosen to limit such grants of fees to their clear terms. (*Alyeska Pipeline Service Company v. Wilderness Society*, 95 S. Ct. 1612, 421 U.S. 240, 44 L. Ed. 2d 141 (U.S. Dist. Col. 1975), *held*, Congressional utilization of the private attorneys general concept can in no sense be construed as a grant of authority to jettison the traditional rule against nonstatutory allowances of attorneys fees to the prevailing party,

and to award attorneys fees whenever courts deem the public policy furthered by a particular statute important enough to warrant an award.) Parties such as CBE, which seek their attorneys fees and costs as a part of private prosecutions, must show a clear statutory policy requiring a deviation in their case from the general rule of law.

The common law also limits authority over prosecutions and decisions not to prosecute to the state. (*Bucolo v. Adkins*, 96 S. Ct. 1086, 424 U.S. 641, 47 L.Ed. 2d 301, *conformed to* 332 So. 2d 25 (U.S. Fla. 1976), *held*, Florida follows the common law with respect to nolle prosequi, and vests in its Attorney General exclusive discretion to determine that the state is unwilling to prosecute.) Congress has, in other statutes, provided for the use of independent counsel (28 U.S.C.A. Section 594, Independent Counsel to exercise authority of Attorney General), or for private counsel. (31 U.S.C.A. Section 3718, private counsel may be used by agencies for debt collections.) Such laws retain oversight or supervision in other governmental bodies (*Cf.* 28 U.S.C.A. Section 595, relative to Congressional oversight with respect to Independent Counsel functions; and 31 U.S.C.A. 3718(b)(5)(A) and (B), requiring that all contracts with private counsel contain provisions permitting the Attorney General or the heads of executive, judicial, or legislative agencies which referred a matter for collection to terminate representation by private counsel, or to resolve the disputes in question, respectively.) The determination of what prosecutions are in the public interest is normally a matter for the agency in question, and not for private persons. (*Cf. Southport Petroleum Co. v. N.L.R.B.*, 62 S. Ct. 432, 315 U.S. 100, 86 L.Ed. 718, *held*, a contempt petition for violation of

an injunction following a determination by the National Labor Relations Board can only be instituted by the Board in the public interest.)

As Petitioner details, Congress has permitted and the Court has upheld limited private prosecutions under various federal environmental statutes. Petition for Certiorari at 8, 19-20. Commentators have noted that the legislative histories of these statutes "indicate some congressional caution about giving private parties the power to enforce regulatory statutes." Barry Boyer and Errol Meidinger, *Privatizing Regulatory Enforcement*, 34 Buff. L. Rev. 833, 846 (1985). Explicit limitations on citizen suits include provisions directing fines to the U.S. Treasury, and not to citizen plaintiffs. *See* Greve, *Private Enforcement*, at 106. Whatever the practical results (and commentators like Mr. Greve have argued that the settlement process in citizen suits already provides a nonappropriated entitlement program for the environmental movement), it is clear that Congress can and has established a policy of limitation of private activity in and profit from environmental enforcement action. In *Gwaltney v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987), this Court noted that:

> If citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably. The same might be said of state authorities. Respondents' interpretation of the scope of citizen suit would change the nature of the citizen's role from interstitial to potentially intrusive. We cannot agree that Congress intended such a result.

The same concerns that this Court had with citizen suits for past Clean Water Act violations are present in EPCRA actions. Citizen plaintiffs should not be permitted to file suit for past violations that EPA chose to resolve with little or no penalty. The Court should determine whether the concerns it had regarding the proper application of the Clean Water Act in *Gwaltney* should also apply to private prosecutions under EPCRA.

B. Congress Did Not Choose To Permit Citizen Suits For Past Violations Of EPCRA

Respondents below suggested, and the Seventh Circuit agreed, that Congress's inclusion of a 60-day notice period, along with explicit permission for citizen suits for some past violations, in the Clean Air Act Amendments of 1990, 42 U.S.C. § 7604(a), means that a court should hold that citizens should be able to sue for past EPCRA violations even without such explicit permission. Petition for Certiorari at A13. Leaving aside the constitutional question of citizen standing to sue for past violations even with such explicit permission, Petition for Certiorari at 16-19, the legal argument suggested is inconsistent with ordinary principles of statutory interpretation. The first question is, of course, whether an amendment to a statute on a different subject (Clean Air) would have any effect on one concerned with emergency planning. Absent any explicit cross-reference, or specific repeal, the usual principle of common law, that the law does not favor repeal or amendment of an older statute by a newer one by mere implication, applies. *See, e.g., United States v. Fausto*, 484 U.S. 439, 453 (1988). This Court decided early

that repeal or amendment by implication is possible only if it arises out of a clear repugnancy between two laws, and that the newer law abrogates the older only to the extent that it is inconsistent and irreconcilable with it. *Chew Heong v. United States*, 112 U.S. 535, 549 (1884); *Wood v. United States*, 16 Pet. 342, 362-63, 10 L. Ed. 987, 995 (1842).

No amendment by implication is possible here. Congress could have chosen to amend all environmental statutes to explicitly permit suits for past violations after this Court's *Gwaltney* decision. It did not do so. It could, and did, insert explicit permission for suits for some past violations in the Clean Air Act Amendments of 1990. Absent such explicit permission, the 60-day notice requirement of EPCRA should be given the meaning intended by Congress and consistent with the Court's analysis of identical language in the Clean Water Act in *Gwaltney*. The Seventh Circuit should be directed to conform its interpretation to that of the Court, and of Congress.

C. Illinois Law Favors Self-Reporting And Efforts To Come Into Compliance, Not Paperwork Prosecutions

If the Court decides that federal law permits private enforcement even when a paperwork violation has been cured and despite a 60-day notice period, it will ignore the policy implications of recent Illinois law. The Illinois General Assembly recognized the purpose of reporting statutes to be compliance. Given the real possibility of inadvertent violations, it decided the best way to insure

compliance is through a grace period to cure without violators being subject to the additional penalty of citizen suits. The General Assembly amended the Illinois Environmental Protection Act to require the Illinois EPA to give a party 30 days' opportunity to bring EPCRA paperwork into compliance. 415 ILCS 5/25b-6, eff. Jan. 1, 1994. The Illinois legislature has not provided a similar grace period if actual harm to the environment such as contamination of the air, water, or land is involved. As a matter of public policy, private prosecutors should not be given more opportunity to enforce EPCRA than the State of Illinois chooses to permit itself.

CONCLUSION

A careful limitation of citizen prosecutions to instances where significant or continuing harm to the public is likely is a rational choice, and serves important public policy interests. Petitioner has suggested that Congress intended such a limitation in 42 U.S.C. § 11046, a position the Sixth Circuit has endorsed. The Court should overrule the Seventh Circuit and restore the appropriate interpretation.

Respectfully submitted,

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